

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

On March 1, 2016, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody (“Pet.”) herein. The Petition purports to be directed to a 2012 conviction sustained by petitioner in Los Angeles County Superior Court. (See Pet. at ¶¶ 1-2; California Appellate Court’s website.)¹ Petitioner purports to be raising five grounds for relief. (See Pet. at ¶ 8(a-e).)

Based on its review of the Petition as well as information derived from the California Appellate Courts website, it appears to the Court that the Petition is time barred. Accordingly, on or before **April 7, 2016**, petitioner is ORDERED to show

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¹ <http://appellatecases.courtinfo.ca.gov/index.html>

1 cause in writing (if any he has) why the Court should not recommend that this action
2 be dismissed with prejudice on the ground of untimeliness.²

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4 **THE TIME BAR ISSUE**

5 Since this action was filed after the President signed into law the Antiterrorism
6 and Effective Death Penalty Act of 1996 (the “AEDPA”) on April 24, 1996, it is
7 subject to the AEDPA’s one-year limitation period, as set forth at 28 U.S.C. §
8 2244(d). See Calderon v. United States District Court for the Central District of
9 California (Beeler), 128 F.3d 1283, 1287 n.3 (9th Cir. 1997).³ 28 U.S.C. § 2244(d)
10 provides:

11 “(1) A 1-year period of limitation shall apply to an application
12 for a writ of habeas corpus by a person in custody pursuant to the
13 judgment of a State court. The limitation period shall run from the latest
14 of--

15 (A) the date on which the judgment became final by
16 conclusion of direct review or the expiration of the time for
17 seeking such review;

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21 ² The Ninth Circuit has held that the district court has the authority to raise
22 the statute of limitations issue *sua sponte* when untimeliness is obvious on the face
23 of the petition and to summarily dismiss a petition on that ground pursuant to Rule
24 4 of the Rules Governing Section 2254 Cases in the United States District Courts, so
25 long as the court “provides the petitioner with adequate notice and an opportunity to
26 respond.” See Nardi v. Stewart, 354 F.3d 1134, 1141 (9th Cir. 2004); Herbst v. Cook,
27 260 F.3d 1039, 1042-43 (9th Cir. 2001).

28 ³ Beeler was overruled on other grounds in Calderon v. United States District Court (Kelly), 163 F.3d 530, 540 (9th Cir. 1998) (en banc).

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.”

From a review of the Petition, as well as the California Appellate Courts website, it appears that petitioner appealed the underlying judgment of conviction to the California Court of Appeal, which subsequently affirmed the judgment on July 14, 2014. Thereafter, petitioner filed a Petition for Review in the California Supreme Court on or about August 14, 2014 which was subsequently denied on October 15, 2014. Thus, “the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review” was January 13, 2015, when the 90-day period for petitioner to petition the United States Supreme Court for a writ of certiorari expired. See Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999); Beeler, 128 F.3d at 1286 n.2. Therefore, for purposes of 28 U.S.C. § 2244(d)(1)(A), petitioner’s judgment of conviction “became final by conclusion of direct review or the expiration of the time for seeking such review” on January 13, 2015, and his one-year limitations period under the AEDPA expired on January 13, 2016, absent either a late-trigger date or a basis for tolling of the statute.

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1 From the face of the Petition, it does not appear that petitioner has any basis for
 2 contending that he is entitled to a later trigger date under § 2244(d)(1)(B). Nor does
 3 it appear that petitioner has a basis for contending that any of his claims is based on
 4 a federal constitutional right that was initially recognized by the United States
 5 Supreme Court subsequent to the date of his conviction became final and that has
 6 been made retroactively applicable to cases on collateral review, as provided in §
 7 2244(1)(C). Finally, it appears that petitioner has no basis for contending that he is
 8 entitled to a later trigger date under § 2244(d)(1)(D) since petitioner was aware of the
 9 **factual** predicate of his claim as of the date his petition for review was denied. See
 10 Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001) (statute of limitations
 11 begins to run when a prisoner “knows (or through diligence could discover) the
 12 important facts, not when the prisoner recognizes their legal significance”).

13 Thus, unless a basis for tolling the statute existed, petitioner’s last day to file
 14 his federal habeas petition was January 13, 2016. See Patterson v. Stewart, 251 F.3d
 15 1243, 1246 (9th Cir. 2001); Beeler, 128 F.3d at 1287-88.

16 28 U.S.C. § 2244(d)(2) provides:

17 “The time during which a properly filed application for State post-
 18 conviction or other collateral review with respect to the pertinent
 19 judgment or claim is pending shall not be counted toward any period of
 20 limitation under this subsection.”

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 22 In Nino v. Galaza, 183 F.3d 1003 (9th Cir. 1999), the Ninth Circuit construed
 23 the foregoing tolling provision with reference to California’s post-conviction
 24 procedures. The Ninth Circuit held that “the statute of limitations is tolled from the
 25 time the first state habeas petition is filed until the California Supreme Court rejects

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1 the petitioner's final collateral challenge." See id. at 1006. Accord, Carey v. Saffold,
 2 536 U.S. 214, 219-21, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002) (holding that, for
 3 purposes of statutory tolling, a California petitioner's application for collateral review
 4 remains "pending" during the intervals between the time a lower state court denies
 5 the application and the time the petitioner files a further petition in a higher state
 6 court). However, the statute of limitations is not tolled during the interval between
 7 the date on which the judgment of conviction became final and the filing of the
 8 petitioner's first collateral challenge. See Nino, 183 F.3d at 1006.

9 Petitioner's Petition for Review to the California Supreme Court was denied
 10 October 15, 2014, and his conviction became final 90 days later, on January 13, 2015.
 11 There is no record of petitioner filing any state habeas petition during the period
 12 between the denial of his Petition for Review and the filing of his federal habeas
 13 petition. Once the AEDPA limitations period lapsed in January 2016, it could not be
 14 reinitiated. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (holding
 15 that § 2244(d) "does not permit the reinitiation of the limitations period that has
 16 ended before the state petition was filed," even if the state petition was timely filed);
 17 Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001); Wixom v. Washington, 264 F.3d
 18 894, 898-99 (9th Cir. 2001); Green v. White, 223 F.3d 1001, 1003 (9th Cir. 2000).
 19 Thus, it appears there is no basis for statutory tolling of the limitations period with
 20 respect to the Petition.

21 In Holland v. Florida, U.S. __, 130 S. Ct. 2549 (2010), the Supreme Court held
 22 that the timely filing of a habeas petition was not jurisdictional, but rather was subject
 23 to equitable tolling. If petitioner intends to rely on the equitable tolling doctrine for
 24 purposes of arguing that his federal habeas petition is timely, he will need to include
 25 with his Response to this Order to Show Cause a declaration under penalty of perjury
 26 stating facts showing (1) that he has been pursuing his rights diligently, and (2) that
 27 some "extraordinary circumstances" beyond petitioner's control stood in his way
 28 and/or made it impossible for him to file the Petition on time. See Pace v.

1 DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005); see also
2 Roy v. Lampert, 465 F.3d 964, 969 (9th Cir. 2006); Raspberry v. Garcia, 448 F.3d
3 1150, 1153 (9th Cir. 2006).

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5 DATED: March 7, 2016
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7 DAVID T. BRISTOW
8 UNITED STATES MAGISTRATE JUDGE
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